NO. 83 5408

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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SUPREME COURT U.S.

NEIMA BORMEY INCHAUSTI, Appellant

v.

RICHARD S. SCHWEIKER, SECRETARY OF

HEALTH AND HUMAN SERVICES, Appellee

APPEAL FROM THE UNITED STATES

COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

NEIMA BORMEY INCHAUSTI
APPELLANT PRO-SE
2068 Selma Street
New Orleans, Louisiana, 70122

QUESTIONS PRESENTED

I.

Whether the position of the United States was substantially justified in the process as to deny an award of attorneys' fees to the prevailing party.

II.

Whether in order to accomplish equality between the United States and the other parties under the Equal Access to Justice Act, special circumstances can make an award of attorneys' fees proper even if the position of the United States if substantially justified, in the same way that special circumstances can make an award of attorneys' fees unjust even if the position of the United States is not substantially justified. (28 U.S.C. 2412 d(3).

III.

Whether it might be unjust not to award attorneys' fees to the prevailing party when the proceedings and lengthy and reasonable attorneys' fees could exceed several times the benefits received or to be received by the prevailing party, even if the position of the United States is substantially justified.

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TABLE OF AUTHORITIES

There are no reported decisions on the specific issues of this case under the Equal Access to Justice Act 28 U.S.C.A. 2412.

Case should be decided taking into account the purpose of the Act and general principles of justice.

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

_____

NEIDA BORMEY INCHAUSTI, Appellant

v.

RICHARD S. SCHWEIKER, SECRETARY OF

HEALTH AND HUMAN SERVICES, Appellee

_____

APPEAL FROM THE UNITED STATES

COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

The Appellant, NEIDA BORMEY INCHAUSTI, nee NEIDA BORMEY, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the order entered by the Fifth Circuit Court of Appeals in this case and should exercise such jurisdiction herein.

ORDER BELOW

The order of the Court of Appeals denying Appellant's Application for Attorneys' Fees under the Equal Access to Justice Act appears in the Appendix hereto.

NATURE OF THE PROCEEDING

This is an appeal against an order of the United States Court of Appeals for the Fifth Circuit denying an application of the plaintiff-appellant for attorneys' fees under the Equal Access to Justice Act after a judgment of the Court of Appeals in favor of the plaintiff-appellant reversing the judgment of the district court and remanding the case for a redetermination of plaintiff-appellant Supplemental Security Income benefits after October, 1978.

DATE OF THE ENTRY OF THE ORDER SOUGHT TO BE REVIEWED.

Date of the entry of the order of the United States Court of Appeals for the Fifth Circuit sought to be reviewed is May 4, 1983.

DATE THE NOTICE OF APPEAL WAS FILED AND THE COURT IN WHICH IT WAS FILED.

Notice of Appeal was filed in the United States Court of Appeals for the Fifth Circuit on June 10, 1983.

JURISDICTION

This appeal arises from an Application for Attorneys' Fees under the Equal Access to Justice Act. The order of the Court of Appeals for the Fifth Circuit was filed on May 4, 1983. A timely Notice of Appeal was filed on June 10, 1983. The jurisdiction of this Court is invoked under the Provisions of Title 28, United States Code, Section 1291.

Appellant was the prevailing party in the Court of Appeals decision and not before, therefore her only possibility to obtain a review of the order is to appeal to the Supreme Court.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 2412 (d) (1) (B)- A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified.

28 U.S.C. 2412 (d) (3)- In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b) (1) (C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

STATEMENT OF THE CASE

Appellant, NEIMA BORREY ZACHARIYI was the prevailing party in BORREY V. SCHWEIKER, 695 F.2d. 164. A copy of the opinion of the Court of Appeals in this case appears in the Appendix hereto and is made part of this statement of the case. Judgment in the above mentioned case was entered on January 14, 1983. A Motion for Stay was filed by Appellee and granted. Mandate finally issued March 15, 1983. An Application for Attorneys' Fees under the Equal Access to Justice Act was filed by Counsel of Appellant on March 30, 1983 and within the thirty (30) days after the Mandate was issued. Questions presented by this appeal were properly raised in the Application. An opposition to Appellant's Application for Attorneys' Fees was filed by Appellee. On May 4, 1983 the Court of Appeals denied application because the position of the United States was substantially justified. Notice of Appeal was filed by Appellant on June 10, 1983 and served to the other parties.

SUBSTANTIALITY OF QUESTIONS PRESENTED

This appeal presents important and substantial questions affecting the rights of litigants under the Equal Access to Justice Act; specially for disabled recipients of Social Security and Supplemental Income benefits.

1. The Court of Appeals erred in not granting attorneys' fees to the Appellant which was the prevailing party against the United States. It is not enough to deny the application for attorneys' fees to state in the order that the position of the United States was substantially justified, even if as alleged by the Appellee, the position of the United States in the litigation had more than a reasonable basis in both fact and law. It is necessary that the actions of the agency, in this case, the Social Security Administration, that led to the court challenge, not just its position in court, must also have been substantially justified.

This case originated because of the action of the Social Security Administration to suspend appellant's SSI benefits in December, 1977, leaving the applicant without payments for a period of more than nine (9) months. This action of the SSA was found to be improper by an administrative law judge and now the Court of Appeals has held in favor of the Appellant in connection with the redetermination of benefits after payments were restarted in October, 1978.

Furthermore, in cases dealing with weaker parties such as disabled recipients of SSI the position of the United States is not justified when it ignores a basic principle of interpretation of remedial statutes which requires a liberal interpretation in favor of the one seeking benefits. It is apparent the narrow construction of pertinent statutes and regulations made by the United States in this case.

An interpretation of the law that might be valid when the United States is litigating with a party at arms length, is not justified when the government is dealing with a weaker party. The United States failed to make the proper concessions under the circumstances of the case, and therefore, its position was not substantially justified. (E.A.J.A. 28 U.S.C. 2412 d (1)(B).

2. But even if the position of the United States is substantially justified it might be unjust not to award fees to the prevailing party when the proceedings are lengthy.

Equal access to justice only can be obtained by a litigant when it is certain that the party prevailing will be able to recover all the expenses of the litigation and the cost of lengthy proceedings will not prevent the party to pursue his claim to the end. In a lengthy litigation reasonable attorneys' fees could exceed several times the amount awarded to a party by a favorable judgment. A party should not be discouraged to pursue his claim when litigation is becoming too long.

In this case, in order to prevail, the appellant exhausted her administrative remedies twice. There were two hearings before administrative law judges, a review before the U.S. District Court and also an appeal before the U.S. Court of Appeals. It is obvious that under the circumstances of this case reasonable attorneys' fees will exceed the benefits that the Appellant could obtain in the redetermination of benefits ordered by the Court of Appeals.

Under E.A.J.A. 28 U.S.C 2412 d(3) an award can be denied when special circumstances make it unjust even if the position of the United States was not substantially justified. To accomplish equality between the United States and the other parties, which is one of the purposes of the Act, this section should be constructed by the Court, in the sense that even if the position of the United States is substantially justified, special circumstances can make an

award of attorneys' fees proper. Special circumstances that justify an award are those that if they are ignored the purpose of the Act is defeated.

CONCLUSION:

For the reasons stated above, appellant submits that this appeal brings before the Court substantial and important questions in connection with the Equal Access to Justice Act which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

12 of July, 1983.

RESPECTFULLY SUBMITTED

Neima Borrey Inchausti

NEIMA BORREY INCHAUSTI
APPELLANT PRO-SE
2068 Selma Street
New Orleans, Louisiana, 70122

APPENDIX

Copy

13-A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U S. COURT OF APPEALS
FILED

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CLERK

NO. 81-3315

NEIMA BORMEY,

Plaintiff-Appellant,

VERSUS

RICHARD S. SCHWEIKER, Secretary
of Health and Human Services,

Defendant-Appellee

. . . . . .

NOTICE OF APPEAL

Notice is hereby given that NEIMA BORMEY, plaintiff-appellant above named, hereby appeals in forma pauperis to the Unites States Supreme Court, under 28 U.S.C. 1291, from the final decision in favor of defendant-appellee and against plaintiff-appellant denying plaintiff-appellant application for attorneys' fees under the Equal Access to Justice Act 28 U.S.C. 2412 (d) (1) (B), entered in this action on the 4th day of May, 1983.

Agustin R. Guitart

AGUSTIN R. GUITART
Attorney for Plaintiff-
Appellant (Applicant)
4218 Clearview Parkway
Metairie, LA 70002

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing, postage prepaid this 9th day of June, 1983, to JOHN VOLZ, United States Attorney, 500 Camp Street, New Orleans, LA 70130 and to the Solicitor General, Department of Justice, Washington, D.C., 20530.

AGUSTIN R. GUITART
Attorney for Applicant

13-B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
MAY 4 1983
GILBERT F. GANUCHEAU
CLERK

No. 81-3315

NEIMA BORMEY,

Plaintiff-Appellant,

versus

RICHARD S. SCHWEIKER, Secretary
of Health and Human Services,

Defendant-Appellee.

- - - - - - - -

Appeal from the United States District Court from the
Eastern District of Louisiana

- - - - - - - -

Before RUBIN, JOHNSON and GARWOOD, Circuit Judges

BY THE COURT:

IT IS ORDERED that appellant's Application for Attorney's Fees Under the Equal Access to Justice Act is DENIED. The position of the United States was substantially justified, even if we were to assume the Act is applicable and appellant's motion was timely and the appellant is a prevailing party.

13-C

Neima BORMEY, Plaintiff-Appellant,

v.

Richard S. SCHWEIKER, Secretary of Health and Human Services, Defendant-Appellee.

No. 81-2315.
Summary Calendar.

United States Court of Appeals, Fifth Circuit.

Jan. 14, 1982.

Suit was filed by disabled recipient of supplemental security income benefits seeking judicial review of decision to reduce benefits by one third because recipient was living in household of parents and receiving support and maintenance from them. The United States District Court for the Eastern District of Louisiana, at New Orleans, Edward J. Boyle, Sr., J., granted summary judgment in favor of the Secretary of Health and Human Services, and recipient appealed. The Court of Appeals, Garwood, Circuit Judge, held that: (1) where recipient was making monthly payment to her parents capable of covering the entire cost of either food or shelter, considered separately, as well as part of the other, but not all of both, it would be presumed that it was intended as such, in the absence of any indication to the contrary, thus rebutting presumption that statutory one-third reduction was applicable on ground that recipient was receiving both food and shelter from her parents, and it would not be appropriate to presume that the payment covered only part of each item, but (2) the Secretary was not estopped to apply the statutory one-third reduction for period during which benefits were erroneously suspended and recipient was not making payments to her parents, where recipient, upon receipt of lump-sum payment for the period of improper suspension, did not pay any of that sum to her parents and considered herself under no obligation to do so.

Reversed and remanded.

1. United States Magistrates ⇐5

Failure to file objections to magistrate's findings and conclusions did not preclude review of judgment accepting the same, where there was no showing that the parties had been informed that objections had to be filed within ten days of filing of magistrate's report and there was no challenge to resolution by the magistrate or the district court of any disputed factual issues.

2. Social Security and Public Welfare ⇐140.5

Review in social security case is ordinarily limited to determining whether record as a whole contains substantial evidence to support findings of the Secretary of Health and Human Services, but reviewing court must also determine whether the Secretary applied the proper legal standard in reducing benefits and whether proceedings below were conducted in conformity with applicable statutes and regulations. Social Security Act, § 205(g), as amended, 42 U.S.C.A. § 405(g).

3. Social Security and Public Welfare ⇐175

Unearned income being received by a recipient of supplemental security income at the time the recipient becomes an adult must be considered by the Social Security Administration in determining eligibility for, and amount of, benefits at that time.

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Social Security Act, §§ 1612, 1612(a)(2)(A), as amended, 42 U.S.C.A. §§ 1382a, 1382a(a)(2)(A).

4. Social Security and Public Welfare ⇐175

Statutory one-third reduction in supplemental security income benefits when eligible individual lives in another person's household and receives support and maintenance in kind from such person is, when applicable, irrebuttable regardless of any payment the individual may make toward his or her support and maintenance. Social Security Act, § 1612(a)(2)(A), as amended, 42 U.S.C.A. § 1382a(a)(2)(A).

5. Social Security and Public Welfare ⇐175

For purposes of determining applicability of one-third statutory reduction in supplemental security income benefits, there was no error in determination that recipient, who lived with her parents and two sisters, was "living in another person's household" within meaning of the applicable statute and regulations. Social Security Act, § 1612(a)(2)(A), as amended, 42 U.S.C.A. § 1382a(a)(2)(A).

6. Social Security and Public Welfare ⇐175

Under applicable regulations, for purposes of determining applicability of one-third statutory reduction in supplemental security income benefits, when eligible individual lives in another person's household he or she is presumed to be receiving in-kind support and maintenance in the form of both food and shelter from that person, and the one-third reduction applies unless the presumption is rebutted. Social Security Act, § 1612(a)(2)(A), as amended, 42 U.S.C.A. § 1382a(a)(2)(A).

7. Social Security and Public Welfare ⇐175

Where recipient of supplemental security income benefits living in her parents' home was making a payment capable of covering the entire cost of either her food or shelter, considered separately, as well as part of the other item, it would be presumed that the payment was intended as such, in the absence of any indication to the contrary, and thus recipient showed that she did not receive, without payment, both food and shelter from her parents and rebutted the presumption that statutory one-third reduction in benefits applied; it was improper to presume that recipient's payment covered only part of each of the two items. Social Security Act, §§ 1602, 1612, 1612(a)(2)(A), as amended, 42 U.S.C.A. §§ 1381a, 1382a, 1382a(a)(2)(A).

8. Social Security and Public Welfare ⇐175

The Secretary of Health and Human Services was not estopped from applying statutory one-third reduction in Supplemental Security Income benefits to recipient who was receiving food and shelter from her parents without payment, on theory that in absence of erroneous suspension of benefits recipient would have continued previous payments to her parents for food and shelter, where, when recipient received lump-sum payment for the period of improper suspension, she did not pay any of the same to her parents or consider herself under obligation to do so. Social Security Act, § 1612(a)(2)(A), as amended, 42 U.S.C.A. § 1382a(a)(2)(A).

Appeal from the United States District Court for the Eastern District of Louisiana.

Before RUBIN, JOHNSON and GARWOOD, Circuit Judges.

GARWOOD, Circuit Judge:

This is an appeal from a summary judgment upholding the appellee's decision to reduce appellant's Supplemental Security Income benefits by one third pursuant to 42 U.S.C. § 1382a(a)(2)(A), because she was living in the household of her parents and receiving support and maintenance from them. The principal question is whether this statutory one-third reduction was applicable. We hold that it was not, as to a part of the time in issue, and remand the case for further proceedings.

I.

The material facts are undisputed. Appellant Neima Bormey ("Bormey") was born on January 10, 1958. She suffers from a degenerative disease of the legs and arms, which has rendered her permanently disabled, and she lives at home with her parents and two sisters. In July 1974, the district office of the Social Security Administration determined that Bormey was eligible for full Supplemental Security Income ("SSI") benefits as a disabled child. The administrative record shows that Bormey was paid full benefits because her parents told the district office that they had no income.

On November 8, 1977, when Bormey was 19, she made an application with the district office to be made the payee of her SSI benefits. On November 10, 1977, the district office, having learned that her father had worked and earned income as a painter for the past five years, notified Bormey that her SSI benefits were being suspended effective December 1977. The district office maintained that she was ineligible to receive those benefits because her father's income was deemable to her since she was under 21 and a student.

Bormey, who was represented by counsel and continued to be throughout all the subsequent administrative proceedings, requested a hearing before an administrative law judge ("ALJ"). On August 19, 1978, the ALJ ordered reinstatement of her benefits. He found that Bormey was an adult, and was not a regular student, and that, as such, her father's income was not deemable to her.[1] No party has challenged this determination. The ALJ remanded the case to the district office for recalculation of benefits.

On October 2, 1978, the district office, following the August 1978 remand by the ALJ, determined that because Bormey was not contributing any money toward the household expenses, she was living in the

1. Under the regulations, "a child under age 21" living with one or both parents may have "deemed" to the child the income of a parent who is ineligible for SSI benefits. *See* 20 C.F.R. § 416.1165 (1982). Under section 416.1101 (1982) a "child" is defined as an unmarried person, not the head of a household, who either is "under age 18 or is under age 22 and a student." So far as is here relevant, these same regulatory provisions were applicable to Bormey at all pertinent times. Since Bormey was unmarried, was not the head of a household, was living with her parents, and was over 18 and under 21, her status as a "child" whose father's income could be "deemed" to her depended on whether she was "a student." She attended school, but did so irregularly. The ALJ determined that her school attendance was not sufficiently *regular* so as to constitute her a "student"; since she was over 18 and not a "student," she was not "a child"; since she was not a "child" her parents' income could not be "deemed" to her, and denial of her benefits on the basis of such "deeming" was accordingly held to be erroneous.

household of her parents and receiving support and maintenance from them, and that accordingly the SSI benefits payable to her commencing in December 1977 must be reduced by one third pursuant to 42 U.S.C. § 1382a(a)(2)(A) and the then implementing regulation, 20 C.F.R. § 416.1125 (now sections 416.1136-416.1145).

Bormey had been paid no SSI benefits during the period December 1977 through September 1978. In October 1978, she was paid in a lump sum ($1,358.58) benefits, reduced by one third on account of the support and maintenance she had received, for that period, and monthly payments to her were resumed at the rate of $126.27, also reflecting the one-third reduction.[1]

On January 22, 1979, Bormey requested another hearing before an ALJ. At this hearing, which was held on May 7, 1979, both Bormey and her father testified that before her benefits were terminated, she contributed $100 a month toward the household expenses; that she lived in her parents' house with her mother and father and two sisters; that during the time her benefits were terminated, she had no income and was therefore unable to make any contributions; that after her benefits were resumed in October 1978, she again contributed $100 a month to the household expenses; that monthly household expenses totaled $697.10, of which $400 was for food and the balance for mortgage payments and utilities; that her pro rata share of the total household expenses was $139 per month; and that were she to receive full benefits, she would pay her pro rata share of all the household expenses.

The ALJ held that the one-third statutory reduction in Bormey's benefits was proper, and his decision was affirmed by the Administration's Appeals Council, thus becoming a final decision of the appellee, the Secretary of Health, Education, and Welfare (now the Secretary of Health and Human Resources), who administers the SSI program.

[1] Having exhausted her administrative remedies, Bormey filed suit against the appellee in federal district court under 41 U.S.C. § 405(g) seeking judicial review of the adverse decision. Both parties filed motions for summary judgment. The district court referred the matter to a magistrate, who conducted a hearing and recommended that appellee's motion for summary judgment be granted. The district court accepted the magistrate's recommendation and rendered summary judgment for appellee.[2]

1. Although it is undisputed that Bormey received full SSI benefits from July 1974 to November 1977, there is no direct evidence of the dollar amount of those payments as actually made to Bormey. However, it is indicated that full benefits were to be at the following monthly rates: from 7/1/74 to 6/30/75, $146.00; from 7/1/75 to 6/30/77, $157.70; from 7/1/77 to 6/30/78, $177.80; from 7/1/78, $189.40.

2. The district judge's April 27 order granting appellee's motion for summary judgment, and denying that of appellant, recites that notice of the filing (on April 9) of the magistrate's Findings and Conclusions was given the parties and "no objections thereto have been filed." This, however, does not prevent review of the judgment below under *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir.1982) (*en banc*). There is no showing that the parties had been informed that objections must be filed within ten days of filing of the magistrate's report, as required by *Nettles*. *Id.* at 408. Moreover, "[t]he *Nettles* bar only prevents one from challenging factual findings that have been adopted or accepted by the district court." *Tijerina v. Estelle*, 692 F.2d 3, 3 n. 1 (5th Cir.1982). Here, appellant does not challenge the magistrate's, or the district court's, resolution of any disputed factual issues.

II

[2] Our review is ordinarily limited to determining whether the record as a whole contains substantial evidence to support the appellee's findings. *Thomas v. Schweiker*, 666 F.2d 999, 1001 (5th Cir.1982). However, we must also determine whether appellee applied the proper legal standard in reducing Bormey's SSI benefits, and whether the proceedings below were conducted in conformity with the applicable statutes and regulations. *See Strickland v. Harris*, 615 F.2d 1103, 1108 (5th Cir.1980); *Ferran v. Fleming*, 293 F.2d 569, 571 (5th Cir.1961); *Chamberlain v. Schweiker*, 518 F.Supp. 1236, 1238 (C.D.Ill.1981).

[3] The first question raised by Bormey is whether, upon becoming an adult, she had a right to the standard (or full) SSI payment without regard to any support or maintenance she had received, or was receiving, from her parents before or at the time she became an adult. Bormey, in effect, argues that unearned income received by a recipient while he or she is a child cannot be used to reduce SSI benefits once the recipient becomes an adult, even though after becoming an adult that income is still being received. We disagree.

The statutes which govern the SSI program plainly show it was Congress's intent that SSI benefits be paid only to the extent an individual's minimum income level is not being met from other sources. *See* H.R. Rep. No. 92-231, 92d Cong., 2d Sess., *reprinted in* [1972] U.S.Code Cong. & Ad. News 4989, 5135–36. *See also Weise v. Schweiker*, 519 F.Supp. 762, 765 (S.D.N.Y. 1981). Under 42 U.S.C. § 1381a,[4] a disabled individual's eligibility for SSI benefits is determined "on the basis of his income and resources." Under 42 U.S.C. § 1382a,[5] income is defined as including both earned and unearned income, and unearned income includes "support and maintenance furnished in kind" to the individual. If the individual lives in the household of another and receives both maintenance and support from that person, then the amount payable to the individual is reduced by one third. 42 U.S.C. § 1382a(a)(2)(A).

It has long been recognized that in questions of statutory interpretation, "the construction of a statute by an agency charged with its administration is entitled to some deference. *Dennard v. Richards Group, Inc.*, 681 F.2d 306, 315 (5th Cir.1982). The appellee has interpreted these statutes to require that an individual's income be an

4. 42 U.S.C. § 1381a provides:

"§ 1381a. Basic entitlement to benefits

"Every aged, blind, or disabled individual who is determined under part A to be eligible on the basis of his income and resources shall, in accordance with and subject to the provisions of this subchapter, be paid benefits by the Secretary of Health, Education, and Welfare."

5. 42 U.S.C. § 1382a provides, in part:

"§ 1382a. Income; definition of earned and unearned income; exclusions from income

"(a) For purposes of this subchapter, income means both earned income and unearned income, and—

"(2) unearned income means all other income, including—

"(A) support and maintenance furnished in cash or kind, except that (i) in the case of any individual (and his eligible spouse, if any) living in another person's household and receiving support and maintenance in kind from such person, the dollars amounts otherwise applicable to such individual (and spouse) as specified in subsections (a) and (b) of section 1382 of this title shall be reduced by 33⅓ percent in lieu of including such support and maintenance in the unearned income of such individual (and spouse) as otherwise required by this subparagraph, ..."

important factor in determining his or her initial or continuing eligibility for SSI benefits and the amount thereof. *See* 20 C.F.R. §§ 416.202 and 416.203.[6] Eligibility for SSI benefits and the amount payable is therefore based on the actual need of the individual whether at the time he or she makes an initial application[6] for benefits or whether he or she already receives them. It follows that the actual needs of a recipient will be considered even when he or she becomes an adult. Thus, the income received by a child, which he or she still receives after becoming an adult, will be considered in determining eligibility for, and the amount of, SSI benefits.

The "benefit anomalies" described by Bormey in her brief which may occur as a result of this construction flow from the differences in the level of generosity of the applicant's or recipient's relatives or friends, and the statute was fashioned to recognize those generosity differences in determining initial and continuing eligibility for, and the amount of, SSI benefits. *See Usher v. Schweiker*, 666 F.2d 652, 659 (1st Cir.1981). We hold that the unearned income being received by a recipient at the time he or she becomes an adult must be considered by the Social Security Administration in determining eligibility for, and the amount of, SSI benefits at that time.

The next question raised by Bormey is whether the unearned income, in the form of support and maintenance, received by her from her parents triggered the statutory one-third reduction in her SSI benefits.

Before October 3, 1980, the application of the statutory one-third reduction was governed by 20 C.F.R. § 416.1125, which was originally adopted on January 29, 1974. 39 Fed.Reg. 3674 (1974).[7] This regulation was, however, amended on July 7, 1978, and subpart K of the amended regulation provided

6. 20 C.F.R. § 416.202 (1982) provides:
"§ 416.202 Who may get SSI benefits.
"You are eligible for SSI benefits if you meet all of the following requirements:
"(a) You are—
"(1) Aged 65 or older (Subpart H);
"(2) Blind (Subpart I); or
"(3) Disabled (Subpart I).
"(b) You are a resident of the United States (§ 416.1602), and—
"(1) A citizen or a national of the United States (§ 416.1603);
"(2) An alien lawfully admitted for permanent residence in the United States (§ 416.1604); or
"(3) An alien permanently residing in the United States under color of law (§ 416.1605).
"(c) *You do not have more income than is permitted* (Subparts K and D).
"(d) You do not have more resources than are permitted (Subpart L).
"(e) You file an application for SSI benefits (Subpart C)." (Emphasis added.)
20 C.F.R. 416.203 (1982) provides:
"§ 416.203 Initial determinations of SSI eligibility.
"(a) *What happens when you apply for SSI benefits.* When you apply for SSI benefits we will ask you for documents and any other information we need to make sure you meet all the requirements. We will ask for information about your income and resources and about other eligibility requirements and you must answer completely. We will help you get any documents you need but do not have.
"(b) *How we determine your eligibility for SSI benefits.* If you apply for SSI benefits in the first month of a calendar quarter, we determine your eligibility for the whole calendar quarter. If you apply for benefits in the second or third month of the calendar quarter, we determine your eligibility for SSI benefits separately for each month in that calendar quarter. After the first quarter, we determine your eligibility for whole calendar quarters."
See also 20 C.F.R. § 416.610 (1982).

7. The original (January 1974) version of 20 C.F.R. § 416.1125 provided:
"§ 416.1125 Unearned income; support and maintenance.
"(a) Unearned income includes support and maintenance furnished in cash or in kind.

that its provisions would be effective with January 1974, unless specifically indicated to the contrary. Effective October 3, 1980, the regulation was revised and reorganized. 45 Fed.Reg. 65541 (1980). The substantive provisions, however, remain essentially the same as the 1978 version and now appear as sections 416.1130–416.1145.

Section 416.1125, as amended in 1978, was in effect when Bormey's case was heard by the ALJ in May 1979.[8] The ALJ, however, applied the original (1974) version, and held that the statutory one-third reduction was applicable. This holding was based on the ALJ's finding that Bormey's contribution was less than her pro rata share of the household expenses, and on his conclusion that she was therefore living in the household of her parents and receiving support and maintenance from them. The magistrate who considered the motions for summary judgment on October 15, 1980, applied the amended (1978) version of section 416.1125, but he also determined that Bormey's benefits should be reduced by the statutory one-third reduction.

Applying the amended regulation to the facts found by the ALJ, we hold that although there is substantial evidence to uphold his factual findings, both the ALJ and

Support and maintenance may generally be defined as room and board, and would also include other incidentals necessary to an individual's normal sustenance.

"(b) *In the case of any eligible individual (or eligible individual and eligible spouse) living in another person's household and receiving support and maintenance in kind from such person, such individual's (or eligible individual and eligible spouse) payment standard of $130 per month (or $195 per month for an eligible individual and eligible spouse) will be reduced by one-third in lieu of including the value of such support and maintenance as unearned income to the individual (or eligible individual and eligible spouse).*

"(c) *Such one-third reduction in the payment standard will apply only for months wholly spent in the household of another person. Thus, the reduction is made beginning with the first full calendar month in which an individual (or eligible individual and eligible spouse) lives in another person's household and ends with the last such full calendar month.*

"(d) *Such one-third reduction will apply regardless of whether the individual (or eligible individual and eligible spouse) is making any payment for support and maintenance (room and board) to the person in whose household he is living.*

"(e) Such one-third reduction in the payment standard will not apply where an individual (or eligible individual and eligible spouse) are living in a commercial establishment (e.g., rooming or boarding house) or institution. 'Another person's' household refers to the household of a private individual.

"(f) *Such one-third reduction in the payment standard will not apply where only support or maintenance (i.e., room or board) is furnished in kind, both support and maintenance must be furnished for such reduction to apply. Where only support or maintenance is furnished in kind, the value of such support or maintenance will be included as unearned income in accordance with paragraph (a) of this section.*

"(h) Such one-third reduction in the payment standard will not apply to the payment standard of any individual who is subject to the provisions of § 416.1180 and is living in the household of the person from whom income is or would be deemed." (Emphasis added.)

8. The provisions of section 416.1125(h), as amended in 1978, became effective October 1, 1978 for all new and pending claims and for all redetermined cases which do not receive lower payments solely because of the amendment. Even if revised subsection (h) did not apply, the result in Bormey's case is the same under original subsection (h) insofar as the inapplicability of the statutory one-third reduction is concerned. *See* section 416.1124(f) of original regulation. Under either version, subsection (d) of the amended (1978) section 416.1125, which became effective with SSI payments for December 1974, applied (*see* note 12, *infra*).

the magistrate erred in their legal conclusion that the SSI benefits payable to Bormey were subject to the statutory one-third reduction.

9. 20 C.F.R. 416.1125(b), as amended in 1978, provided:

"§ 416.1125 Unearned income, support and maintenance.

"(b) *One-third reduction for individual living in another person's household—(1) General.* The standard payment amount for an eligible individual (or both members of a couple as defined in § 416.1206(c)(3)), who lives in another person's household and receives support and maintenance in kind from such person, will be reduced by one-third in lieu of determining the value of such support and maintenance as unearned income to the eligible individual (or couple). The one-third reduction when applicable, is made beginning with the first full calendar month in which an eligible individual (or couple) lives in another person's household and receives both food and shelter from that other person, and ends with the last such full calendar month. The one-third reduction in the standard payment amount applies regardless of any payment the individual (or couple) may make toward the support and maintenance unless, effective October 1978, that payment meets the requirements of paragraph (b)(3)(iv) of this section. Effective with amounts payable for December 1974, when the one-third reduction applies, any additional in-kind support and maintenance an eligible individual (or couple) receives is not counted as income regardless of the source.

"(i) For purposes of this paragraph (b), the one-third reduction applies for a particular month only if an eligible individual lives in another person's household throughout a calendar month except for temporary absences (see paragraph (j) of this section) and receives in-kind support and maintenance in the form of both food and shelter from the person in whose household he or she lives. An individual may live in two or more households during an entire month and be subject to the one-third reduction if he or she does not maintain his or her own household during this period.

[4] Under section 416.1125(b)(1)[9] as amended in 1978, the standard payment amount for an eligible individual who (1) lives in another person's household and (2)

"(ii) Where the one-third reduction is not applicable, but the eligible individual (or couple) is receiving in-kind support and maintenance which is not excluded from income under the provisions of this subpart K, such support and maintenance is valued as described in paragraphs (c) through (i) of this section.

"(2) *Another person's household.* A household refers to a personal place of residence which is not a commercial establishment (e.g., a rooming or boarding house), a noninstitutional care home as defined in § 416.1125(c), or an institution as defined in § 416.331(b). An eligible individual (or couple) will be presumed to be living in another person's household (except as provided by paragraph (b)(3)), whenever the individual (or couple) lives in a household which has at least one other member who is not:

"(i) The individual's spouse (as defined in § 416.1806);
or

"(ii) A minor child; or

"(iii) A person whose income is deemable to the individual under § 416.1185 (published as a notice of proposed rulemaking with interim effect at 42 FR 3314, January 18, 1977) or § 416.1190.

"(3) *Not another person's household.* An individual is not considered to be living in another person's household when:

"(i) The eligible individual or a living-with spouse has an ownership or life estate interest in the home; or

"(ii) The eligible individual or a living-with spouse is liable to the landlord for payment of any portion of the rental charges; or

"(iii) The eligible individual is living in a subsidized home in the form of a noninstitutional care situation as defined in § 416.1125(c)(3); or

"(iv) The eligible individual is paying at least a pro rata share of the average monthly total household operating expenses as described in paragraph (b)(3) of this section.

"(4) *Receiving in-kind support and maintenance.* When an eligible individual (or couple) lives in another person's household (as described in paragraph (b)(2)), he or she will be presumed to be receiving in-kind support

receives both support and maintenance in kind from such person, is to be reduced by one third, in lieu of determining the actual dollar value of such support and mainte-

and maintenance in the form of both food and shelter from the person in whose household he or she lives, and the one-third reduction will apply unless the presumption is rebutted as provided in paragraph (b)(8).

"(5) *Total household operating expense.* Total household operating expenses means the average of total monthly expenditures for food, rent or mortgage payments, real property taxes, heating fuel, gas, electricity, water, sewer services and garbage collection services. The term refers only to amounts actually expended by the household for the purposes specified in this paragraph (5); it does not include the value of any in-kind support and maintenance provided by a source external to the household. *A pro rata share of total household operating expenses is determined by dividing the monthly average of those expenses by the number of persons in the household regardless of age or individual consumption of any of the items.* Payment of an amount which is within $5 of the monthly pro rata share is considered to meet the pro rata requirement. A pro rata share is generally determined by averaging the specified household expenses for the 12-month period prior to determination. If independent or collateral verification is not available to establish payment of a pro rata share the eligible individual (or couple) shall state the reason therefor and submit other evidence of probative value.

"(6) *Rebuttal. Applicability of the one-third reduction may be rebutted by showing that an eligible individual:*

"(i) Does not live in another person's household; *or*

"(ii) Does not live in another person's household throughout a month; *or*

"(iii) *Does not receive both food and shelter from the person in whose household he or she lives. An individual who purchases (i.e., pays for) his or her own food, or who receives food from someone other than the householder is not receiving in-kind support and maintenance as required in paragraph (b)(4);*

"...

"(7) *Deeming.* When an eligible individual and a person whose income must be deemed to the eligible individual under § 416.1165 (see paragraph (b)(2)(iii) of this section), or § 416.1190 both live in another person's household within the meaning of this paragraph (b), the deeming rules apply to the eligible individual in addition to the one-third reduction rules.

"(8) *Effective date.* The provisions set forth in this paragraph (b) are effective October 1, 1976. However, in the case of any recipient who receives a lower supplemental security income payment or becomes ineligible upon redetermination solely through the application of these rules (i.e., there has been no actual change in his or her living arrangement) the provisions are effective on the first day of the quarter following the redetermination.

"(c) *Household situations not included under paragraph (b) of this section. The reduction in the payment standard for living in the household of another and described in paragraph (b)(1) of this section will not apply in the following situations and support and maintenance provided in kind will be valued as provided herein and in paragraphs (d) and (e) of this section.*

"(1) *In the case of an eligible individual (or eligible individual and eligible spouse) who lives in another person's household and receives in-kind support and maintenance from that other person in the form of food only or shelter only, but not both.*

"...

"(3) In the case of an individual whose subject to the provisions of this part regarding the deeming of income (§ 416.1185 (published as a notice of proposed rulemaking with interim effect at 39 FR 2487 and amended at 42 FR 3316, January 18, 1977) or § 416.1190) and who is living in the household of the person from whom income is or would be deemed. In such case, any support and maintenance furnished by the person in whose household the individual is living is not counted as income.

"(4) In the case of an eligible individual (or eligible individual and eligible spouse) who lives in his or her own household, including a commercial establishment (e.g., rooming or boarding house).

"(5) In the case of an eligible individual (or eligible individual and eligible spouse) who has been placed in a noninstitutional care situation and receives nonexcludable in-kind

nance as unearned income to the eligible individual. This one-third reduction is statutory, 42 U.S.C. § 1382a(a)(2)(A),[10] and when applicable, is irrebuttable regardless of any payment the individual may make toward his or her support and maintenance. Section 416.1125(b)(1). *See also* 43 Fed. Reg. 29277, 29278–29279 (1978).

[5] The first question is whether Bormey lived in the household of another. An eligible individual is presumed to be living in another person's household whenever the household has at least one other member who is not the eligible individual's spouse, minor child, or a person whose income is deemable to the individual, section 416.1125(b)(2), unless the eligible individual has an ownership interest in the home, is liable to the landlord for payment of any portion of the rental charges, is living in a substitute home in the form of a noninstitutional care situation, or is paying at least a pro rata share of the average monthly total household operating expenses. Section 416.1125(b)(3).

The evidence shows that Bormey lived with her parents and two sisters; that none of their income was deemable to her; and that she failed to satisfy any of the exceptions of section 416.1125(b)(3). We therefore hold that the ALJ and the magistrate correctly determined that Bormey was living in the household of another.

[6] The second question is whether Bormey received *both* support and maintenance from her parents. Under section 416.1125(a),[11] support and maintenance in kind is defined as encompassing food, clothing, and shelter. When an eligible individual lives in another person's household he or she is presumed to be receiving in-kind support and maintenance in the form of both food and shelter from that person, and the one-third reduction applies unless the presumption is rebutted. Section 416.1125(b)(4). The applicability of the one-third reduction may be rebutted by showing, among other things, that an eligible individual does not receive *both* food and shelter from the person in whose household he or she lives. Section 416.1125(b)(6)(iii).

[7] Bormey proved that before her SSI benefits were erroneously suspended in December 1977, and after they were resumed in October 1978, she contributed $100 a month toward the payment of the household expenses. The evidence shows that as of May 1979 the pro rata monthly cost of

support and maintenance. For purposes of this section, a noninstitutional care situation exists when: (i) an individual or couple is placed by a public or private agency under a specific program of protective placement such as foster or family care; and (ii) the placement is in a private household which is licensed or otherwise approved by the placing agency to provide such care; and (iii) the placing agency retains responsibility for continuing supervision; and (iv) the person providing the care accepts payment from the individual, the placing agency, or some other party." (Emphasis added, except section headings.)

10. *See* note 5, *supra*.

11. 20 C.F.R. § 416.1125(a), as amended in 1978, provided:

"(a) *General.* Unearned income includes support and maintenance furnished in cash or in kind unless otherwise excluded under this subpart K. Support and maintenance in kind encompasses food, clothing, and shelter or any portion of any or all of such items. Unless otherwise specified herein, the value of in-kind support and maintenance refers to its current market value. For purposes of this subpart K, the term standard payment amount refers to the Federal payment rate as described in §§ 416.410–416.413."

Bormey's food was $80 and that of her shelter was $30. The evidence does not indicate whether Bormey's $100 payment was earmarked for food or for shelter. This $100 amount, however, was sufficient to cover the entire cost of one item and part of the other. The reasoning of the appellee, the ALJ, and the magistrate presumes that the $100 payment covered only part of each. We reject this presumption. Where a payment is capable of covering the entire cost of each item (whether food or shelter) considered separately, as well as part of the other, we presume that it was intended as such, in the absence of any indication to the contrary. We hold that Bormey rebutted the presumption that the statutory one-third reduction applied by showing that she did not receive, without paying therefor, both food and shelter from her parents.

When an eligible individual lives in a household of another and receives from that person only food or shelter in kind, such support or maintenance is unearned income. Section 416.1125(d).[12] In such case, effective with payments for December 1974, the maximum value of such support or maintenance is presumed to be one third of the applicable payment standard. The individual may rebut this presumption by establishing that the current market value of such support or maintenance, less any payment he or she makes therefor, is lower than the presumed value. Section 416.1125(d).

Because the ALJ and the magistrate erred in determining that the statutory one-third reduction applied, no determination was made as to whether, and if so to what extent, the then current market value of Bormey's food or shelter, less any payment made therefor, was lower than the presumed value. The case must therefore be remanded to the appellee for further proceedings to determine the proper amount of benefits due Bormey since October 1978, when she recommenced making her payments to her father.[13]

12. 20 C.F.R. § 416.1125(d), as amended in 1978, provided:

"(d) *Valuation of support and maintenance for individuals in household situations.* When an eligible individual (or eligible spouse) lives in a household (i.e., is not in an institution), *the reduction in the payment standard described in paragraph (b) of this section is inapplicable*, and the provisions of §§ 416.1185 (see paragraph (c)(3)) and 416.1190 do not apply, *any support and maintenance received in kind* but not received in lieu of cash wages (see § 404.429(c) of this chapter) *is unearned income.* In such cases effective with payments for December 1974, *the maximum value of such support and maintenance is presumed to be that amount which, for an individual or a couple with no other income, would result in payment at two-thirds of the applicable payment standard*; i.e., the value is presumed to be one-third of the payment standard, plus the exclusion applicable to unearned income. *This presumption will be applied in determining the benefits payable unless it is rebutted by the individual's establishing that the current market value of such support and maintenance, less any payment he makes therefor, is lower than the presumed value. This rule will apply in the following circumstances:*

"(1) *When an eligible individual (or eligible individual and eligible spouse) lives in the household of another and receives from that other person only support or maintenance in kind* as described in paragraph (c)(1) of this section . . . .

"(2) When an eligible individual (or eligible spouse) lives in his own household, including a commercial establishment, and receives support and maintenance in kind." (Emphasis added, except for section heading.)

13. Each party shall be afforded an opportunity to present additional evidence, if desired, on the question of the then current market value of the food and shelter furnished Bormey, less any payment made for same.

We express some doubt as to the validity of the amount of presumptive reduction of section

[8] As to the period from December 1977 through September 1978, when Bormey was unable to make any payments to her parents because of the erroneous suspension of her benefits, she claims that appellee is estopped to apply the statutory one-third reduction. Bormey argues that if she had been paid her benefits during this time she would have used them to continue her $100-a-month payments to her parents for her food or shelter.

There is some surface appeal to Bormey's argument, but we must reject it. At the May 1979 hearing Bormey, through her attorney, made it quite clear that she had not paid any of the lump-sum payment she received in October 1978 to her parents, and that she considered herself under no obligation to do so. Her position was that while her benefits were suspended she did not, expressly or impliedly, agree to reimburse her parents, either absolutely or conditionally on her receipt of benefits, for any of the food or shelter they furnished her during this period. Nor, according to her, did any such obligation arise as a matter of law.[14] Her estoppel argument is based on the premise that if she had timely received the benefit checks she would have used them to pay for her support or maintenance. But what she seeks to achieve by estoppel is to force the government to now put her in a better position than she would have been in if matters had proceeded as she says they should and would have but for the erroneous suspension of her benefits. Even if she had received full benefits ($1,611.52) throughout this ten-month suspension period, and had accordingly continued to pay $100 a month ($1,000) to her parents for support or maintenance, she would have been left with only $611.52,[15] as

416.1125(d). When an individual living in the household of another pays the cost *neither* of his or her food *nor* of his or her shelter, the statutory one-third reduction applies. If the individual pays either for his or her food or for his or her shelter, one might logically assume that a rebuttable one-sixth (or other fraction smaller than one third) reduction in benefits would be in order. The appellee, however, presumes a full one-third reduction even though one item of support and maintenance is being paid by the individual. Unlike the statutory one-third reduction, there appears to be no statutory basis for this regulatory presumptive one-third reduction. On remand, we invite the appellee and Bormey to consider the validity of the presumptive one-third reduction of section 416.1125(d). Our doubts are apparently not shared by the Ninth Circuit, although it may not have directly addressed the above-indicated concerns. *Young v. Schweiker*, 680 F.2d 680, 682 (9th Cir.1982).

14. At the May 1979 hearing, Bormey's attorney stated to the ALJ:

> "I think for the period in which the payments were suspended, I think the full benefit will be, got to be paid because the Administration is estopped from raising the issue that she was not contributing to household expenses, because the Administration with its action was claiming that position. But we don't raise in connection with that point any specific issues that claimant is going to repay Mr. Bormey [her father]. What we're trying to say is, from now on, if she gets full benefits, if she gets full benefit, she will contribute, she will contribute to the household expenses for instance starting from this point right now, not to the past. I think in the past we cannot go back and see was any obligation between the father and the claimant to pay or not to pay. They supported, at that time, without any obligation and nobody is asking for that money, I mean we're not asking for that money for claimant to repay Mr. Bormey. I think she's entitled to that during the period in which the payment[s] were suspended, she's entitled to the full benefits."

This position was never modified or retracted.

15. Indeed, to have been entitled to full benefits, without any reduction for the value of any unreimbursed food or shelter, she would have had to pay more than $100 a month, as the foregoing portions of this opinion reflect.

opposed to the $1,208.58 she eventually received in a lump sum and asserts she is entitled to fully retain. Bormey has not suffered any ultimate financial prejudice by reason of the erroneous suspension of her benefits.[16] Moreover, there is no assertion, nor any indication in the record, that the suspension of benefits was for any invidious reason or consideration, or was anything other than a bona fide, and quite understandable, factual error. In these circumstances, we do not believe that the considerations of "justice and fair play," *United States v. Lazy F C Ranch*, 481 F.2d 985, 988 (9th Cir.1973), weigh so heavily as to authorize an estoppel against the government. *See Schweiker v. Hansen*, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981); *Augusta Aviation, Inc. v. United States*, 671 F.2d 445, 448–50 (11th Cir.1982). Accordingly, we uphold the statutory one-third reduction of benefits applicable to the period December 1977 through September 1978, during which Bormey's parents, in whose house she lived, furnished her support and maintenance without any reimbursement.

We reverse the judgment of the district court and remand the case to that court with directions to further remand the case to appellee for a redetermination of Bormey's benefits for October 1978 and subsequent months in accordance with this opinion.

REVERSED AND REMANDED.

16. Nor have her parents been shown to have suffered legal prejudice as a result of such suspension. There was no claim or showing that they were legally obligated to support Bormey. Even if they were, the increased benefits Bormey seeks, she seeks for herself, not for them. *See* note 14, *supra*. Moreover, the administrative record reflects that Bormey successfully sought to have herself determined not a "child" in order to avoid having her father's income "deemed" to her, thus rendering her ineligible for any benefits. By its erroneous suspension of benefits, the government may have "imposed" upon the generosity of Bormey's parents, but a certain amount of such "imposition" is in any event inherent in the statutory scheme of reducing benefits for support and maintenance donated by others. The remedy for this instance of erroneous "imposition" on her parents is surely not to grant Bormey a greater net financial recovery than she could have possibly obtained had the error she complains of not occurred.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of July, 1983, a copy of the Jurisdictional Statement was mailed postage prepaid to the United States Attorney, Counsel of Appellee. I further certify that all parties registered to be served have been served, including Solicitor General, Department of Justice, Washington, D.C., 20530.

Selma B Duhaut

SELMA BORNEY DUHAUST
APPELLANT PRO-SE
2068 Selma Street
New Orleans, Louisiana, 70122

NO. 83 5408

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NEIMA BORMEY INCHAUSTI, Appellant

v.

RICHARD S. SCHWEIKER, SECRETARY OF

HEALTH AND HUMAN SERVICES, Appellee

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APPEAL FROM THE UNITED STATES

COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

MOTION TO HAVE FILED A TIMELY FILING

TO THE CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

NEIMA BORMEY INCHAUSTI
APPELLANT PRO-SE
2068 Selma Street
New Orleans, Louisiana, 70122

NO. _____

IN THE

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NEIMA BORMEY INCHAUSTI, Appellant

v.

RICHARD S. SCHWEIKER, SECRETARY OF

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APPEAL FROM THE UNITED STATES

COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

MOTION TO HAVE FILED A TIMELY FILING

TO THE CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

The Appellant moves to have filed her timely filing of an appeal from the U.S. Court of Appeals for the Fifth Circuit to review an order of the Court of Appeals denying Appellant's application for attorneys' fees in incidental proceedings under the Equal Access to Justice Act.

The reason for this motion is that the Clerk of Court by letters of July 8, 1983 and July 22, 1983 refused to have filed the timely appeal with a Motion to Proceed returning the appeal documents for reasons not supported by the statutes and by the rules of this court.

In support of this motion, Appellant submits the following:

1. Facts on which motion is based.
2. Legal argument in support of this motion.

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TABLE OF AUTHORITIES

There are no reported decision on this issue under Equal Access to Justice Act.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

28 U.S.C. 2412 (d) (1) (B)- A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified.

28 U.S.C. 2101 (c)- Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

SUPREME COURT RULE 11- The time for filing the notice of appeal runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the notice of appeal for all parties (whether or not they requested rehearing or joined in the petition for rehearing, or whether or not the petition for rehearing relates to an issue the other parties would raise) runs from the date of the denial of rehearing or the entry of a subsequent judgment.

FACTS ON WHICH MOTION IS BASED

Appellant, NEIDA BORNEY DACHAUSTI was the prevailing party in Borney v. Schweiker, 695 F.2d. 164 (Fifth Circuit). The opinion of the Court of Appeals was issued January 14, 1983. A Motion to Stay was filed by Appellee and granted. Mandate finally issued March 15, 1983 which is the date of the entry of the Judgment of the Court of Appeals. An Application for Attorneys' Fees under the Equal Access to Justice Act was filed by Counsel of Appellant on March 30, 1983 and within the thirty (30) days after the mandate was issued and the decision was final. Reasons of law were presented by Appellant in support of her application. An opposition to the Application for Attorneys' Fees was filed by Appellee. On May 4, 1983, the Court of Appeals by order, denied application because the position of the United States was substantially justified. Then Appellant filed a Notice of Appeal on June 10, 1983 which was properly served to the other parties.

On July 2, 1983 Appellant filed in this Court an Appeal against the Order of the Fifth Circuit denying attorneys' fees, together with a Motion to Proceed In Forma Pauperis (both documents attached herewith to have them filed definitely), as they were deposited in U.S. Post Office, first class, postage prepaid and properly addressed to the Clerk of this Court.

On July 8, 1983, the Clerk of this Court returned the Appeal and the Motion to Proceed In Forma Pauperis to Appellant for the reasons: Absence of a Notice of Appeal and also for the reason that the appeal appears to be untimely.

Then an Affidavit (original attached herewith) was mailed to this court on July 16, 1983 to establish the time of the mailing of the documents (July 2, 1983) and also to call the attention of the Clerk of Court that a Notice of Appeal was filed, served to the other parties and received by the Court of Appeals as

indicated by a copy of the Notice of Appeal included in the Appendix of the Jurisdictional Statement.

On July 22, 1983, the Clerk of this Court returned the Appeal documents again to the Appellant stating in his letter that: I am again returning your Petition for Writ of Certiorari (SIC) since the time for filing this pleading must be computed from the U.S. Court of Appeals decision of January 14, 1983 and not from any Order denying attorneys' fees

LEGAL ARGUMENT IN SUPPORT OF THIS MOTION

1. The error of the Clerk of Court in not admitting the Appeal Documents is obvious. This is not a petition for writ or certiorari or appeal to seek review of the Court of Appeals in Romney v. Schweiker, (695 F.2D.164). This is an appeal against an order of the Court of Appeals denying an application (petition) for attorneys' fees under the Equal Access to Justice Act filed after a Judgment of the Court of Appeals in favor of the Appellant. This application or petition of attorneys' fees together with the opposition of the Appellee and the order of the court are the matter of separate proceedings which are incidental or collateral to the appeal proceedings in the Court of Appeals, but different from the main cause; with separate pleadings and requiring also a separate decision of the court.

Under the Equal Access to Justice Act (E.A.J.A.) 28 U.S. C 2412 (d) (1) (B), the Petition for Attorneys' Fees is not made in the appeal brief but by an application filed within thirty (30) days after the final judgment in the action. Therefore, petitions under E.A.J.A. are subject to incidental proceedings and decided separately from the main action.

2. Under the Rule 11 of this court, the time for filing the Notice of Appeal runs from the date of the decree sought to be reviewed. In this case the decree or

decision to be sought in the order of the court dictated under the E.A.J.A. proceedings on May 4, 1983 and not the date of the decision in the main cause, January 14,1983. The Notice of Appeal was filed June 10, 1983 and therefore within the time allowed by law for taking such appeal. In this particular case the time allowed by law is ninety (90) days under 28. U.S. C 2101 (c).

3. The appeal itself was filed within the time allowed by law: 90 days, 28 U.S.C 2101 (c).

CONCLUSION

WHEREFORE, Appellent prays to have filed her timely filing of an appeal from the U.S. Court of Appeals for the Fifth Circuit to review an order of the Court of Appeals denying appellant's Application for Attorneys' Fees in incidental proceedings under the Equal Access to Justice Act, and her motion to proceed in forma pauperis.

RESPECTFULLY SUBMITTED

NEIMA BORMEY INCHAUSTI
Appellant Pro-Se
2068 Selma Street
New Orleans, Louisiana, 70122

Aug 17-1983

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 1983 a copy of this Motion was mailed postage prepaid to the United States Attorney, Counsel for Appellee. I further certify that all parties registered to be served have been served, including Solicitor General, Department of Justice, Washington, D.C. 20530.

NEIMA BORMEY INGRAM

NO. 83 5408

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RECEIVED
JUL 6 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NEIDA BORMEY INCHAUSTI, Appellant

v.

RICHARD S. SCHWEIKER, SECRETARY OF

HEALTH AND HUMAN SERVICES, Appellee

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL

IN FORMA PAUPERIS

I, NEIDA BORMEY INCHAUSTI being duly sworn, depose and say that I am the Appellant, in the above entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs of give security therefore, I state that because of my poverty I am unable to pay the cost of said proceeding or to give security therefore; that I believe I am entitled to redress. I also state that leave to proceed in forma pauperis was granted by the District Court and the Court of Appeals.

I further swear that I am not presently employed and have never been employed; that I have not received within the past twelve months any income from business, profession or other form of self-employment nor from rents, interest or dividends; that my husband's income within the last twelve months was approximately $3,000; and that I do not own any real estate, stocks, bonds,

notes, automobiles or other valuable property except ordinary household furnishings and clothing.

I further swear that I have a child that depends on my husband and myself.

I understand that a false statement written in this affidavit will subject me to penalties for perjury.

NEIMA BURNEY DIDAUSTI

SUBSCRIBED AND SWORN TO before me this 1st day of July, 1983.

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

NO. 83 5408

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NEIMA BORMEY INCHAUSTI, Appellant

V.

RICHARD S. SCHWEIKER, SECRETARY

OF HEALTH AND HUMAN SERVICES, Appellee

AFFIDAVIT IN SUPPORT OF TIMELY FILING

I, NEIMA BORMEY INCHAUSTI, being duly sworn, depose and say that I am the Appellant, in the above entitled case and that I filed my Appeal and the Motion to Proceed In Forma Pauperis within the permitted time, as they were deposited in the United States Main Post Office of Metairie, Louisiana, first class postage prepaid and properly addressed to the Clerk of this court on the 2nd day of July, 1983 together with copies to the other parties.

I further say that a photo copy of a postmarked receipt for certified mail No. P 427 736 874 as proof of my timely filing is attached to this document.

I further say that I did include a copy of the Notice of Appeal to the lower court in the appendix of my Jurisdictional Statement.

I understand that a false statement written in this affidavit will subject me

to the penalties of perjury.

NEIMA BORHEY INCHAUSTI

SUBSCRIBED AND SWORN before me

this 15TH day of July, 1983.

NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on this 16TH day of July, 1983 a copy of this affidavit was mailed postage prepaid to the United States Attorney, Counsel of Appellee. I further certify that all parties registered to be served have been served, including Solicitor General, Department of Justice, Washington, D.C., 20530.

NEIMA BORHEY INCHAUSTI

P 427 736 874

RECEIPT FOR CERTIFIED MAIL

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No. 83-5408

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NEIMA BORMEY INCHAUSTI, APPELLANT

v.

MARGARET M. HECKLER,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO DISMISS

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

WILLIAM KANTER
DANIEL BENSING
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly denied appellant's application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. (Supp. V) 2412(d), upon concluding that the position of the United States was substantially justified.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-5408

NEIMA BORMEY INCHAUSTI, APPELLANT

v.

MARGARET M. HECKLER,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO DISMISS

The Solicitor General, on behalf of the Secretary of Health and Human Services, moves to dismiss this appeal for lack of jurisdiction. Treating the appeal as a petition for a writ of certiorari, the petition should be denied.

OPINIONS BELOW

The order of the court of appeals denying appellant's application for attorney's fees (J.S. App. 13-B) is unreported. The underlying opinion of the court of appeals (J.S. App. 13-C), upon which appellant based her claim for attorney's fees, is reported at 695 F.2d 164.

JURISDICTION

The order of the court of appeals denying appellant's application for attorney's fees was entered on May 4, 1983 (J.S. App. 13-B). A notice of appeal to this Court was filed on June 10, 1983 (J.S. App. 13-A). The jurisdictional statement was filed on July 5, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1291 (J.S. 7). We discuss this Court's jurisdiction at page 5, infra.

STATEMENT

1. Appellant Neima Bormey Inchausti has received Supplemental Security Income (SSI) benefits as a disabled child since 1974. In November 1977, the district office of the Social Security Administration (SSA) learned that Inchausti's father had been earning income for the previous five years. Since Inchausti's benefits were conditioned on a lack of family income, the district office ordered her benefits suspended effective December 1977. J.S. App. 13-C, at 1759.

Inchausti appealed this decision and, on August 19, 1978, an Administrative Law Judge ordered reinstatement of her benefits. The ALJ found that Inchausti, then 20 years old, was neither a child nor a regular student for purposes of social security regulations. Consequently, the ALJ held that her father's income could not be "deemed" to her (see 20 C.F.R. 416.1101, 416.1165). J.S. App. 13-C, at 1759.

Following the ALJ's remand for recalculation of benefits, the SSA's district office determined that because Inchausti lived with her parents but did not contribute any money toward household expenses, she was receiving support and maintenance from them. Accordingly, the district office concluded that the SSI benefits payable to her commencing in December 1977 should be reduced by one third, pursuant to 42 U.S.C. 1382(a)(2)(A).1/ J.S. App. 13-C, at 1759-1760. Inchausti received a lump-sum payment covering the period in which her benefits had been suspended, reduced by the statutory one-third for support and maintenance furnished by her parents (id. at 1760).

1/ The statute provides that a one-third reduction is to be made in the standard SSI benefits payable to a person living in the house of another and receiving support and maintenance in kind from that other person. The statutory reduction is made in lieu of crediting the claimant with unearned income that also would result in a reduction in benefits. See J.S. App. 13-C, at 1761 n.5.

At a second hearing before an ALJ, Inchausti and her father testified that before her benefits were terminated, she had contributed $100 a month toward household expenses. This evidence was apparently offered to establish that Inchausti was not receiving both food and shelter from her parents and that her SSI benefits were therefore not subject to a mandatory one-third reduction. See J.S. App. 13-C, at 1764-1767. The ALJ concluded, however, that the one-third reduction was proper, a decision that was upheld by the Social Security Administration's Appeals Council (id. at 1760).

Inchausti then filed suit in the United States District Court for the Eastern District of Louisiana. The district court, accepting the recommendations of a magistrate, ruled for the government. J.S. App. 13-C, at 1760.

2. On Inchausti's appeal, the court of appeals held for Inchausti on some points, the Social Security Administration on others, and remanded the case for a redetermination of benefits (J.S. App. 13-C). First, the court of appeals rejected Inchausti's argument that any unearned income she was receiving in the form of support and maintenance from her parents should be disregarded in determining the appropriate level of SSI benefits (id. at 1762).

The second question was whether the unearned income received by Inchausti triggered the statutory one-third reduction in benefits. Inchausti was presumed to be receiving in-kind support and maintenance from the fact that she lived in her parents' home; however, the court of appeals held that she had rebutted that presumption by showing that, when she was receiving SSI benefits, she paid her parents $100 per month as her contribution toward household expenses. J.S. App. 13-C, at 1766-1767.

Since the pro rata monthly cost of Inchausti's food and shelter was $80 and $59, respectively, and since Inchausti's $100 was not earmarked for either food or shelter, the court of appeals found that the $100 was sufficient to cover one item in full and part of another (J.S. App. 13-C, at 1767). On that basis, the court concluded that Inchausti did not receive both food and shelter from her parents and thus did not come within the statutory provision requiring a mandatory one-third reduction in SSI benefits (ibid.). The case was remanded to the ALJ for a determination of the current market value of the food and shelter furnished Inchausti by her parents, less any payments she had made (ibid.).

Finally, the court of appeals held that the government was not estopped from applying the statutory one-third reduction to the lump-sum payment Inchausti received for the period when her benefits were suspended because she had not paid her parents any money for food and shelter during that time, and she considered herself under no obligation to reimburse her parents out of the lump-sum payment she later received (J.S. App. 13-C, at 1768-1769). This Court denied Inchausti's petition for a writ of certiorari to review the court of appeals' judgment (No. 82-6544 (June 13, 1983)).

3. On March 30, 1983, Inchausti applied to the court of appeals for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. (Supp. V) 2412(d). The court denied her request in a brief order (J.S. App. 13-B):

> The position of the United States was substantially justified, even if we were to assume the [Equal Access to Justice] Act is applicable and appellant's motion was timely and the appellant is a prevailing party.

ARGUMENT

1. This case is not within the Court's appellate jurisdiction. Inchausti relies (J.S. 7) on 28 U.S.C. 1291, which provides that the federal courts of appeals shall have jurisdiction to review final orders of the district courts. No statute brings this action within the appellate jurisdiction of this Court. Accordingly, the appeal should be dismissed. Treating the appeal as a petition for a writ of certiorari (28 U.S.C. 2103), the petition should be denied. The decision of the court of appeals is plainly correct, and further review is not warranted.

2. The government is not liable for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. (Supp. V) 2412(d),2/ when, inter alia, "the position of the United States

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2/ 28 U.S.C. (Supp. V) 2412(d) provides in pertinent part:

> (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

The term "substantially justified" is explained in the legislative history as follows (S. Rep. 96-253, 96th Cong., 1st Sess. 6-7 (1979)):

> The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made.
>
> * * * * *
>
> The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing.

was substantially justified." Inchausti apparently does not dispute that the government's litigation position was substantially justified; instead, she claims that the focus of the "substantial justification" inquiry should be on the actions of the SSA prior to the litigation (J.S. 10). Those actions, Inchausti appears to contend, were not substantially justified, and thus she believes attorney's fees should have been awarded by the court of appeals.

The meaning of "position of the United States" for purposes of 28 U.S.C. (Supp. V) 2412(d) has caused some divergence in the circuits. Four courts of appeals have squarely held that "position of the United States" refers only to the government's position in the litigation. See United States v. 2,116 Boxes of Boned Beef, No. 82-1537 (10th Cir. Jan. 23, 1984), slip op. 11; Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983), petition for cert. pending, No. 83-981; Tyler Business Services, Inc. v. NLRB, 695 F.2d 73, 75 (4th Cir. 1982); Broad Avenue Laundry & Tailoring v. United States, 693 F.2d 1387, 1390 (Fed. Cir. 1982). One circuit has held that the government's "position" includes, in addition to the government's litigation position, the underlying agency action that precipitated the lawsuit. Natural Resources Defense Council, Inc. v. EPA, 703 F.2d 700 (3d Cir. 1983).

While we believe that the majority rule adopted by the courts of appeals is correct (i.e., that "position of the United States" refers to the government's litigation position), this case does not actually present that issue. First, the court of appeals' brief order denying Inchausti's fee application does not discuss the issue and does not indicate which position of the United States (its litigation position or the underlying position of the agency) was substantially justified. More importantly, this is not a case in which the position of the United States in litigation differed in any material way from the underlying

administrative action.3/ On the contrary, as is typical in Social Security Act cases,4/ the government's litigation position was simply to defend the agency's action on the basis of the administrative record. In these circumstances, having implicitly conceded that the government's litigation position was substantially justified, Inchausti is hard pressed to show that the underlying government action defended in the litigation was not.

In any event, as the court of appeals' opinion reflects (J.S. App. 13-C), the agency's administrative handling of this case was certainly not unreasonable. Indeed, the Secretary's determination was sustained by the district court, and the court of appeals upheld the Secretary on a number of points (J.S. App. 13-C, at 1761-1762, 1766, 1768-1769). Although the court of appeals rejected the Secretary's method for allocating Inchausti's monthly contribution of $100, the court nowhere suggested that the Secretary's approach had been arbitrary or without a substantial basis.

Accordingly, the government's position was at all times "substantially justified" within the meaning of the Equal Access

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3/ As the court recognized in Spencer v. NLRB, 712 F.2d at 551-552 (footnotes omitted), the dispute over the meaning of "position of the United States" is largely academic:

> Examination of the variety of controversies covered by the Act reveals that, in the large majority of contexts, it makes no functional difference how one conceives of the government's "position." * * * In the usual case, the government acts in a particular fashion and then defends its conduct before an administrative agency and/or a court. Under such circumstances, the litigation position of the United States will almost always be that its underlying action was legally justifiable.

4/ See Guthrie v. Schweiker, 718 F.2d 104, 108 (4th Cir. 1983).